

OPINION ON REHEARING

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

SONNY MITCHELL,

Defendant and Appellant.

D073263

(Super. Ct. No. SCD267957)

APPEAL from a judgment of the Superior Court of San Diego County,  
Esteban Hernandez, Judge. Affirmed in part; sentence vacated; remanded for  
resentencing with directions.

Daniel J. Kessler, under appointment by the Court of Appeal, for Defendant and  
Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Heather M.  
Clark, Deputy Attorneys General, for Plaintiff and Respondent.

## I.

### INTRODUCTION

A jury found Sonny Mitchell guilty of two counts of burglary (Pen. Code, § 459)<sup>1</sup> (Counts 1, 3), two counts of theft from an elderly person (§ 368, subd. (d)) (Counts 2, 4), and one count of failure to appear while on bail (§ 1320.5) (Count 5). With respect to the burglaries charged in counts 1 and 3, the jury found that each of the burglaries was of an inhabited dwelling (§ 460, subd. (a)), against an elderly person (§ 667.9, subd. (a)), and that another person, other than an accomplice, was present in the residence during the commission of the crime (§ 667.5, subd. (c)(21)).

After Mitchell waived his right to a jury trial on several prior conviction allegations, the trial court found that Mitchell had suffered two strike priors (§§ 667, subds. (b)–(i), 1170.12, 668), two serious felony priors (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)), and two prison priors (§§ 667.5, subd. (b), 668).

The trial court sentenced Mitchell to an aggregate term of 70 years to life in prison. The trial court sentenced Mitchell to serve two consecutive terms of 25 years to life in prison for the two residential burglary counts pursuant to the Three Strikes law (§§ 667, subds. (b)–(i), 1170.12). In addition, the court sentenced Mitchell to two consecutive two-year terms for the elderly victim enhancements under section 667.9, subdivision (a), a consecutive six-year term for violation of section 1320.5; and two five-

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<sup>1</sup> All subsequent statutory references are to the Penal Code, unless otherwise specified.

year prison terms for the serious felony priors under section 667, subdivision (a). The trial court struck the one-year prison prior enhancements in accordance with *People v. Jones* (1993) 5 Cal.4th 1141.

On appeal, Mitchell claims that the trial court erred in taking judicial notice that he had suffered several prior convictions, pursuant to Evidence Code section 1109,<sup>2</sup> because the court's action improperly removed from the jury's consideration an issue that it was obligated to decide. Mitchell also argues that the trial court erred in instructing the jury concerning its consideration of the prior conviction evidence under Evidence Code section 1109 by failing to define the terms "abuse of an elder" and "financial abuse." Mitchell further contends that the trial court abused its discretion under Evidence Code section 1109, subdivision (e),<sup>3</sup> in admitting evidence of his commission of certain crimes that occurred more than 10 years prior to the commission of the charged offenses.<sup>4</sup>

Finally, in a petition for rehearing filed before our initial decision in this matter became final, Mitchell contends that his sentence should be vacated and the matter

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<sup>2</sup> Evidence Code section 1109 permits the introduction of evidence of a defendant's commission of uncharged crimes in certain criminal cases, including those involving elder abuse.

<sup>3</sup> As discussed in part III.C, *post*, Evidence Code section 1109, subdivision (e) provides that evidence of conduct that occurred more than 10 years prior to the charged offense is inadmissible unless the trial court determines that admission of the evidence is in the interest of justice. (Evid. Code, § 1109, subd. (e).)

<sup>4</sup> Mitchell also claims that the trial court abused its discretion in admitting evidence of his prior convictions under Evidence Code section 1101, subdivision (b). For reasons that we explain in part III.D, *post*, we need not consider this contention.

remanded for resentencing so that the trial court may consider whether to exercise its discretion to strike his two prior serious felony enhancements under Penal Code section 667, subdivision (a)(1), as amended by Senate Bill No. 1393 (S.B. 1393), chapter 1013. We conclude that Mitchell's sentence must be vacated and the matter remanded for resentencing with directions that the trial court consider whether to exercise its discretion to strike either or both of the serious felony enhancements (§ 667, subd. (a)(1)) in light of the change in the law. In all other respects, we affirm the judgment.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *The offenses against L.R. (counts 3 and 4)*

On January 27, 2016, L.R.<sup>5</sup> was outside her residence, sweeping her patio. A neighbor observed Mitchell get out of an SUV, approach L.R.'s patio, and begin speaking with L.R. After engaging in a brief conversation with Mitchell, L.R. walked inside her house and shut the door. After a few seconds, the neighbor saw Mitchell open the door to L.R.'s residence and enter the house.

L.R.'s neighbor was concerned. She walked across the street and took a photograph of the license plate of the SUV. As she took the photograph, a woman inside the SUV ducked down, in an apparent effort to not be photographed. Mitchell came out of L.R.'s house and told the neighbor that he had come to paint L.R.'s house.

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<sup>5</sup> L.R. was in her nineties at the time of the charged offenses.

After speaking with Mitchell, L.R. came out of her house and appeared to be in shock. L.R. told the neighbor that Mitchell had followed her into her house and that she was unaware that he was behind her. L.R. further reported that Mitchell had falsely told her that he had painted her house previously. Shortly thereafter, L.R. discovered that money had been taken from her purse.

*B. The offenses against R.M. (counts 1 and 2)*

On January 28, 2016, 80-year old R.M. was in his wheelchair in his garage. Mitchell walked up R.M.'s driveway and asked R.M. whether he had any work that Mitchell could do for him. While speaking with Mitchell, R.M.'s phone rang. R.M. went inside the house and answered the phone.

After hanging up the phone, R.M. returned to the garage area. He saw Mitchell "hurrying off to his car." R.M. went back inside his house and checked a wallet that was on a desk inside the house. He discovered that 36 dollars was missing from the wallet.

*C. The uncharged offense evidence*

As discussed in part III.A.2.d, *post*, the trial court took judicial notice that Mitchell had suffered prior convictions for residential robbery, theft from an elder, and grand theft, in 2002 in Santa Clara County.

Retired detective Cindy Geibig testified regarding her investigation into a series of offenses against elderly victims that occurred in 2001 and were prosecuted in Santa Clara County. The offenses involved a group of seven individuals, including Mitchell, who used a common ruse of offering to do roofing work and roof inspections to distract the victims, in order to gain entry into their residences. Once inside the victim's

residences, the perpetrators took small items such as jewelry, wallets, money and other valuables.

D. *The failure to appear while on bail*

While on bail in this case, Mitchell failed to appear for a court hearing on November 10, 2016.

III.

DISCUSSION

A. *Mitchell forfeited his contention that the trial court erred in taking judicial notice of his prior convictions*

Mitchell claims that the trial court erred in taking judicial notice that he had previously suffered several felony convictions in two prior cases. He argues that it was improper for the trial court to take judicial notice of each of the prior convictions alleged because "[t]he jurors in this case should have been required to determine whether appellant actually suffered the prior conviction for an elder abuse offense."

1. *Relevant law*

a. *Substantive law*

Evidence Code section 1101 provides in relevant part:

"(a) Except as provided in this section and in Section[ ] . . . 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.

"(b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or

whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

Evidence Code section 1109 provides in relevant part:

"[(a)](2) Except as provided in subdivision (e)[<sup>6</sup>] . . . in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."

Evidence Code section 352 provides:

"The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury."

b. *Forfeiture*

A reviewing court may not reverse a judgment based on a trial court's purported erroneous admission of evidence unless the appellant objected to the admission of the evidence in the trial court on the specific ground urged to be erroneous on appeal.

Evidence Code section 353 provides:

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless:

"(a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion; and

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<sup>6</sup> We discuss the exception contained in section 1109, subdivision (e)(1) for acts committed more than 10 years before the charged offense in part III.C, *post*.

"(b) The court which passes upon the effect of the error or errors is of the opinion that the admitted evidence should have been excluded on the ground stated and that the error or errors complained of resulted in a miscarriage of justice."

" 'Specificity is required . . . [in part] to enable the [trial] court to make an informed ruling on the motion or objection . . . . ' " (*People v. Pearson* (2013) 56 Cal.4th 393, 438 (*Pearson*).) Absent a specific objection in the trial court to the evidence on the ground raised on appeal, the appellate contention is forfeited. (*Ibid.*)

## 2. *Factual and procedural background*

### a. *The People's motion in limine*

Prior to trial, the People filed a motion in limine in which they sought permission to introduce evidence at trial that Mitchell had suffered numerous prior convictions in four cases: (1) 2010, Los Angeles, CA case No. NA079339; (2) 2010, Los Angeles, CA case No. VA108993; (3) 2005, Alameda, CA case No. H38090A; (4) 2002, Santa Clara, CA case No. CC128873 (Santa Clara case). The People sought to admit evidence of the prior convictions pursuant to Evidence Code sections 1101, subdivision (b) and 1109, subdivision (a)(2). In their motion, the People sought permission to call the investigating detective from the Santa Clara case, Cindy Geibig, as a witness at trial to "testify as to [the] general scheme as well as to explain that only elderly victims were targeted." (Boldface omitted.)

### b. *The hearing on the People's motion*

The trial court held a hearing on the People's motion at which the court considered the admissibility of the evidence with respect to each of the four cases. With respect to



the Santa Clara case, the People read an e-mail that Geibig had sent to the prosecutor summarizing the facts of that case. As discussed in detail in part III.C.3, *post*, the e-mail explained that Mitchell was one of several suspects arrested and charged with a series of offenses perpetrated against elderly victims in 2001. According to Geibig's e-mail, the perpetrators would contact the victims under the pretense of providing roofing services and would later enter the victims' residences and steal numerous items.

The prosecutor argued:

"I note then that the defendant did plead guilty in [the Santa Clara] case to residential robbery, and two counts of elder theft, and one count of grand theft. And he went to state prison on that case. And I mentioned in chambers, that that is the case that we have the most information on. We have the reports from the separate incidents, and the detective is prepared to testify as to just that -- basically that general information that I have just read to the court."

Mitchell objected to the introduction of evidence pertaining to the Santa Clara case on the ground that it would require the presentation of hearsay. Mitchell also contended that the offenses in the Santa Clara case were not sufficiently similar to the charged offenses to be admissible under Evidence Code section 1101, and that evidence of the offenses should be excluded as unduly prejudicial under Evidence Code section 352. Mitchell further argued that the uncharged crimes in the Santa Clara case were committed more than 10 years prior to the charged offenses and therefore, evidence pertaining to the commission of those offenses could not be admitted under Evidence Code section 1109, unless the court were to find that admission of the evidence would be in the interest of justice.

The prosecutor argued that the evidence of the Santa Clara case was admissible under both Evidence Code sections 1101 and 1109.

After hearing the prosecutor's argument, the court ruled:

"As to . . . the 2002 Santa Clara case, the court finds that that will be admissible under [Evidence Code section] 1101[, subdivision] (b), and also under [Evidence Code section] 1109 . . . The court finds it is in the interest of justice even though it is more than 10 years old.

"So the court finds under both of those. And then under Evidence Code 352, the court finds it is more [p]robative than prejudicial to admit it, and it would not invoke [*sic*] an undue consumption of time."

With respect to the 2010 Los Angeles, CA case No. NA079339, the prosecutor argued that the trial court should admit evidence that Mitchell had suffered a prior conviction for one count of theft from an elder (§ 368, subd. (d)), under Evidence Code sections 1101, subdivision (b) and 1109. Mitchell objected to the introduction of the evidence of the elder theft conviction under section 1101 on the ground that there was insufficient evidence of the nature of the prior crime, including whether there had been "similarities of mod[us] operandi." Defense counsel added, "We don't know if there's anything similar as far as intent or plan or identity." Mitchell also argued that evidence of the prior conviction should not be admitted under Evidence Code section 1109. Defense counsel explained, "[M]y argument would be [Evidence Code section 352]."

After hearing argument from counsel, the court ruled that evidence of the 2010 Los Angeles, CA case No. NA079339 conviction for theft from an elder (§ 368, subd. (d)) would be admissible under section 1109.

The trial court prohibited the People from presenting evidence of Mitchell's prior convictions in the two other cases referred to in their motion in limine, pursuant to Evidence Code section 352, reasoning in part, "I think that there would be a little bit of piling on . . . at that point."

c. *The prosecutor expresses his intent to request that the court take judicial notice of the prior convictions*

During the trial, outside the presence of the jury, the prosecutor stated the following with respect to the People's presentation of evidence of the prior convictions:

"As to the two priors, I imagine that counsel didn't want me submitting the full record of convictions, so I was going to draft a stipulation on just what the defendant pleaded guilty to in each case."

After the court stated, "I think that is the way to do it," the prosecutor asked defense counsel whether he had any thoughts on the subject. Defense counsel stated:

"I have to check. I object to the entrance of it. I . . . have a standing objection to the entrance [*sic*] into evidence. I don't know that I can stipulate if I also object to it."

The following colloquy then occurred:

"[The prosecutor]: I will ask the court to take judicial notice, and I'll draft something and then I can show the court the documents tomorrow, so the court is comfortable taking judicial notice.

"The court: Okay. That would be an acceptable way to address those."

d. *The court takes judicial notice of Mitchell's prior convictions*

At a hearing outside the presence of the jury, the trial court stated that the People had filed a written request for judicial notice of the fact that Mitchell had suffered several

prior convictions in the Santa Clara case in 2002 and in case No. NA079339 from Los Angeles in 2010. The court asked for defense counsel's response to the People's request.

Defense counsel responded:

"Your honor, the defense's response is that we would just renew our objections from the in limine that this is improper 1101 evidence; that it is hearsay, 352, and it violates my client's due-process rights with his prior convictions in this case without witnesses, and just to discuss the conviction.

"I think we went over this in the in limine, and I would renew my objection regarding the admission into . . . evidence."

The court overruled the renewed objections as follows:

"Okay. For the reasons previously stated, the objection is overruled, and the court will take judicial notice of these events.

"It was indicated that this would be less prejudicial than the people putting witnesses on to go into the details of these prior convictions.

"And so, in that it appears this will be less prejudicial to your client by taking judicial notice than having witnesses affirmatively going through those details."

The prosecutor indicated that he would offer in evidence a series of photocopied certified documents that supported the People's request. The court received the documents in evidence.

Upon the jury's return to the courtroom, the court stated:

"The court takes judicial notice of the following:

" . . . '1. On May 23rd, 2002, Sonny Mitchell pleaded guilty to the following four felony charges in Santa Clara County, California, Case Number CC 128873.

" 'a. Penal Code 211/21225<sup>[7]</sup> subdivision (a) residential robbery.

" 'b. Penal Code 368 subdivision (d), theft from an elder.

" 'c. Penal Code 484/487 subdivision (a), grand theft.

" 'd. Penal Code 368 subdivision (d), theft from an elder.

" '2. On May 13th, 2010, Sonny Mitchell pleaded guilty to the following felony charge in Los Angeles county, California. Case number NA079339:

" 'A. Penal Code 368 subdivision (d), theft from an elder.

" '3. Sonny Mitchell served prison sentences for each of these prior offenses.' "

e. *The prosecutor's request that the court instruct the jury on the meaning of the term "judicial notice"*

During a hearing outside the presence of the jury, the prosecutor stated that the court had not instructed the jury as to the meaning of the term "judicial notice." The prosecutor added, "I just thought that there might be some confusion with the jury what the term 'judicial notice' means, and the fact that they have to accept that as true."

After clarifying that the prosecutor was requesting that the court instruct the jury on this topic, the court asked defense counsel, "Anything?" Defense counsel responded in the negative. The court continued:

"Okay. All right. So the court will give that admonishment when I read the instructions."

Upon the jury's return to the courtroom, the trial court stated:

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<sup>7</sup> Rather than "21225," the intended citation is "212.5," as is stated in the People's written request for judicial notice.

"Before I read the instructions, I will just note for you that when the court took judicial notice, that is the same as a stipulation. You must accept it as true."

f. *The court instructs the jury with respect to Mitchell's prior convictions*

The court later instructed the jury on the law that the jury was to apply in reaching its verdicts. With respect to the jury's consideration of evidence of Mitchell's prior convictions, the court instructed the jury pursuant to a modified version of CALCRIM No. 853 in relevant part as follows:

"The People presented evidence that the defendant committed abuse of an elder that was not charged in this case. Specifically, . . . [t]hat he has a conviction for committing theft from an elder in Los Angeles case number NA09079339 in 2010. And a conviction for committing residential robbery, grand theft, and elder theft in Santa Clara, case number CC128873 in 2002.

"Abuse of an elder here means financial abuse.

"An elder is a person residing in California who is aged 65 or older. You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged abuse of an elder.

"Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

"If the People have not met this burden, you must disregard this evidence entirely.

"If you decide that . . . the defendant committed the uncharged abuse of an elder, you may, but are not required to, conclude that the evidence that the defendant was disposed, or inclined to commit abuse of an elder, and based on that decision also conclude that the defendant was likely to commit residential burglary of an elder or theft from an elder and did commit theft as charged here.

"If you conclude that the defendant committed the uncharged abuse of an elder, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of residential burglary of an elder or theft from an elder.

"The People must still prove each charge and allegation beyond a reasonable doubt."

### 3. *Application*

At no point, whether during the motion in limine proceedings, during testimony at trial, at hearings outside the presence of the jury, or during the court's instructing of the jury, did Mitchell argue that it was improper for the court to take judicial notice of his prior convictions. While Mitchell raised several *other* objections with respect to the admissibility of his prior convictions, Mitchell *never* objected that taking judicial notice of the prior convictions was improper. Accordingly, we conclude that Mitchell forfeited his contention that it was improper for the trial court to take judicial notice of the prior convictions. (See *Pearson, supra*, 56 Cal.4th at p. 438.)

Forfeiture is particularly appropriate in this case since it is clear from the record that the trial court took judicial notice of Mitchell's prior convictions in an attempt to lessen any potential for prejudice to Mitchell stemming from the introduction of the evidence of his prior convictions. Accordingly, Mitchell may not now, for the first time on appeal, claim that the court erred in the procedure by which the court permitted the People to present evidence of Mitchell's prior convictions.

- B. *Mitchell forfeited his contention that the trial court erred in failing to define the phrases "abuse of an elder" and "financial abuse" in instructing the jury concerning its consideration of evidence of Mitchell's prior convictions*

Mitchell claims that the trial court erred in failing to define the phrases "abuse of an elder" and "financial abuse" in instructing the jury concerning its consideration of Mitchell's prior convictions.

1. *Procedural background*

During a jury instruction conference, the parties reviewed the wording of the instructions that the trial court intended to provide to the jury. During the conference, the court indicated that it intended to instruct the jury pursuant to CALCRIM No. 853. When asked whether he had any objection to the court giving that instruction, defense counsel stated that he did not.

The court instructed the jury pursuant to a modified version of CALCRIM No. 853 as quoted in part III.A.2.f, *ante*.

2. *Relevant principles of law*

a. *Evidence Code section 1109*

Evidence Code section 1109, subdivision (d)(1) defines "abuse of an elder" as follows:

" 'Abuse of an elder or dependent person' means physical or sexual abuse, neglect, financial abuse, abandonment, isolation, abduction, or other treatment that results in physical harm, pain, or mental suffering, the deprivation of care by a caregiver, or other deprivation by a custodian or provider of goods or services that are necessary to avoid physical harm or mental suffering."



b. *Forfeiture for failure to request clarification of a jury instruction*

"The long-standing general rule is that the failure to request clarification of an instruction that is otherwise a correct statement of law forfeits an appellate claim of error based upon the instruction given. [Citations.]" (*People v. Rundle* (2008) 43 Cal.4th 76, 151 (*Rundle*).)

3. *Application*

The trial court instructed the jury that "[a]buse of an elder . . . means financial abuse." This is a correct statement of the law that tracks the language of the relevant statute. (See Evid. Code, § 1109, subd. (d)(1) ["'Abuse of an elder or dependent person' means . . . financial abuse"].) To the extent that Mitchell desired a more expansive definition of the term, it was incumbent upon him to request such a definition in the trial court. He did not. His contention that the trial court erred in failing to define the terms "abuse of an elder," and "financial abuse," is thus forfeited. (See *Rundle, supra*, 43 Cal.4th at p. 151.)<sup>8</sup>

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<sup>8</sup> Mitchell also claims that the trial court's section 1109 instruction was erroneous because the instruction "merely named appellant's prior convictions without showing the facts underlying those specific convictions to demonstrate that those crimes actually involved 'financial abuse' of elderly people." Mitchell further contends that the evidence offered by the People in support of its request for judicial notice with respect to the Santa Clara case does not establish, with respect to two of the counts, that the victims were in fact elderly.

We find no error. With respect to the Santa Clara case, the instruction stated that Mitchell had suffered convictions "for committing residential robbery, grand theft, and elder theft." The instruction informed the jury that it could "consider this evidence only if the People have proved by a preponderance of the evidence that the defendant, in fact, committed the uncharged abuse of an elder," and defined "abuse of an elder." Thus, the jury was properly instructed that it was required to determine whether the People had

C. *The trial court did not abuse its discretion in admitting evidence of Mitchell's commission of elder abuse crimes that occurred more than 10 years before the charged offenses*

Mitchell claims that the trial court erred in admitting evidence of his commission of elder abuse crimes that occurred more than 10 years before the charged offenses.

1. *Relevant law*

Section 1109, subdivision (a)(2) provides in relevant part:

*"Except as provided in subdivision (e) . . . in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352."* (Italics added.)

The exception contained in subdivision (e) of the statute provides:

"Evidence of acts occurring more than 10 years before the charged offense is inadmissible under this section, unless the court determines that the admission of this evidence is in the interest of justice." (§ 1109, subd. (e).)

In *People v. Johnson* (2010) 185 Cal.App.4th 520, 539 (*Johnson*), the court considered the meaning of the "interest of justice" exception contained in section 1109,

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established that Mitchell's prior offenses constituted "abuse of an elder." To the extent that Mitchell contends that the trial court erred in admitting evidence with respect to two counts from the Santa Clara case because the People did not present evidence that the victims of these counts were elderly, Mitchell failed to object to the evidence on this ground in the trial court. Accordingly, any such claim is forfeited. (Evid. Code, § 353; *Pearson, supra*, 56 Cal.4th at p. 438.)

subdivision (e).<sup>9</sup> The *Johnson* court stated that "[s]ubdivision (e) establishes a presumption that conduct more than 10 years prior to the current offense is inadmissible." (*Johnson, supra*, at p. 539.) In addition, the *Johnson* court rejected the People's argument that section 1109, subdivision (e) "adds little substantively to the analysis under section 352," and concluded instead "that a more stringent standard of admissibility applies." (*Johnson*, at p. 539.) However, the *Johnson* court added:

"That having been said, the 'interest of justice' requirement obviously was not intended to present an insurmountable obstacle to admission of more remote prior conduct. Nor do we think subdivision (e) necessitates an inquiry different in kind from that involved in a determination under section 352. The section 352 balancing approach gives consideration to both the state's interest in a fair prosecution and the individual's constitutional rights. We believe this same type of analysis is appropriate for the 'interest of justice' exception under subdivision (e)." (*Ibid.*)

The *Johnson* court ultimately concluded, "[T]he 'interest of justice' exception is met where the trial court engages in a balancing of factors for and against admission under section 352 and concludes . . . that the evidence was 'more probative than prejudicial.'" (*Johnson, supra*, 185 Cal.App.4th at pp. 539–540.)

Courts have affirmed the admission of remote evidence under Evidence Code section 1109, subdivision (e), where the evidence of the prior acts was similar to the charged offenses. (See *Johnson, supra*, 185 Cal.App.4th at pp. 537–540 [affirming admission of evidence that defendant had committed shootings of two of his prior

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<sup>9</sup> Section 1109 also authorizes the admission of evidence of past incidents of domestic violence. (See Evid. Code, § 1109, subd. (a)(1).) *Johnson* involved this aspect of the statute. (*Johnson, supra*, 185 Cal.App.4th at p. 524.)

girlfriends approximately 18 and 14 years prior to the charged offense involving the defendant's shooting of a girlfriend]; *People v. Culbert* (2018) 218 Cal.App.4th 184, 192–193 (*Culbert*) [affirming admission of evidence of defendant's threatening ex-wife 11 years before the charged offense, since "[i]n both incidents, appellant confronted family members in a small room and threatened to kill them"]; *People v. Megown* (2018) 28 Cal.App.5th 157, 167–169 (*Megown*) [affirming admission of evidence that defendant had engaged in pattern of domestic abuse for 16 years prior to the charged offenses].)<sup>10</sup>

## 2. *Standard of review*

We review a trial court's "interest of justice" determination under section 1109, subdivision (e) for an abuse of discretion. (See *Johnson, supra*, 185 Cal.App.4th at p. 539.)

## 3. *Factual and procedural background*

As discussed in part III.A.2, *ante*, the trial court held a hearing on the admissibility of evidence of Mitchell's commission of a series of offenses in 2001, which were prosecuted in 2002 in the Santa Clara case. The prosecutor read an e-mail that Geibig sent to the prosecutor concerning the facts of the case at the hearing, as follows:

" The following is a summary of elder abuse cases I investigated in 2001 involving a group of individuals that preyed upon elderly victims.

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<sup>10</sup> *Johnson, Culbert, and Megown* all involved the admissibility of prior acts of domestic violence under Evidence Code section 1109. (*Johnson, supra*, 185 Cal.App.4th at pp. 537–540; *Culbert, supra*, 218 Cal.App.4th at pp. 192–193; *Megown, supra*, 28 Cal.App.5th at p. 166.)

" 'In 2001, I was employed by the Milpitas police department assigned to the detective division. In late 2001, a group of suspects were involved in several residential burglaries and/or home robberies within Milpitas. All of the victims were elderly and were contacted by the male suspects on the pretense of performing roofing work or roofing inspections.

" 'After the elder victims were contacted, typically by three people, the suspects would enter the residences and would take numerous small items, often jewelry, wallets, or loose cash. Often one of the suspects would distract the elderly resident while the associates went through the house quickly taking whatever they could store on their person before leaving the house.

" 'In November of 2001, this group struck three separate residences on the same day.

" 'After a lengthy investigation, the suspects were tied to over a dozen incidents through the San Francisco Bay Area. Several suspects were identified, arrested, and booked for several counts of residential burglary, robbery, and elderly abuse.

" 'Sonny Mitchell . . . is one of the suspects identified, arrested, and charged with these crimes.' "

The prosecutor stated that Mitchell pled guilty to residential robbery, two counts of elder theft, and one count of grand theft in that case. The prosecutor noted that the People had reports concerning the incidents and that Geibig was prepared to testify concerning the facts of the case.

The prosecutor noted that the charged offenses involved residential burglaries in which the defendant approached the victims and offered to perform work, and argued that the offenses in the Santa Clara case were similar to the charged offenses in that the modus operandi and the nature of the victims were nearly identical.

Defense counsel argued that the Santa Clara case was "[v]ery different" because those offenses involved a group of perpetrators, while in this case, Mitchell had acted alone. Defense counsel also contended that the court should exclude evidence of the Santa Clara case pursuant to Evidence Code section 352. In that regard, defense counsel argued:

"We are asking a jury to decide that somebody who has done it one, two, three, four times in the past didn't do it this time. We are going to have so many causes for challenge because jurors aren't going to be able to do that. And that will show the court that . . . there is probative value to it, but it is so outweighed by the prejudicial effect."

With respect to Evidence Code section 1109, defense counsel emphasized that the evidence of the Santa Clara case was inadmissible unless the court were to find that it would be in the interest of justice to admit the evidence.

In discussing the admissibility of the evidence under Evidence Code, section 1109, the prosecutor emphasized that, with respect to the charged offenses, the victims would not be testifying in court because one had died and the other was unavailable due to his health. The prosecutor also argued that the defendant "has targeted elderly victims for basically for his entire -- for the past, you know, 15 years or so." The prosecutor added that Geibig would provide general information on the offenses, including that "the victims were elderly," and that "there was the common scheme."

The court ruled that the evidence was admissible under both Evidence Code sections 1101 and 1109. In making its ruling, the court expressly stated that it would be in the interest of justice to admit the evidence even though the Santa Clara offenses

occurred more than 10 years prior to the charged offenses. With respect to Evidence Code section 352, the court stated that it found the evidence "more probative than prejudicial," and added that it would not "invoke [*sic*] an undue consumption of time."

The following day, outside the presence of the jury, the court stated the following with respect to its admission of the evidence pertaining to the Santa Clara case pursuant to Evidence Code section 1109:

"The court acknowledges that 1109(b)[<sup>11</sup>] sets a . . . 10-year limit.

"But in reviewing case law regarding in the interest of justice, the court is relying on [*Johnson, supra*, 185 Cal.App.4th at pages 528 through 540] which has a lengthy discussion regarding 'in the interest of justice.'

"And just to make the record complete, [are] there any additional arguments that either side wishes to make with regards to the court's determination of in the interest of justice."

Both the prosecutor and defense counsel indicated that they had nothing further to add on the issue.

#### 4. *Application*

The trial court could have reasonably determined that the uncharged offenses in the Santa Clara case bore a strong similarity to the charged offenses in that Mitchell targeted elderly victims, contacted the victims in their residences under the pretense of performing work on their behalf, and then stole items from their residences. The strong similarity of the uncharged and charged offenses supported admission of the uncharged offense evidence under the "interest of justice" exception contained in section 1109,

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<sup>11</sup> The intended reference is to Evidence Code section 1109, subdivision (e).

subdivision (e). (See, e.g., *Johnson, supra*, 185 Cal.App.4th at pp. 538–530.) The trial court could also have reasonably determined that the approximately 15 years that had passed between the commission of the charged and uncharged offenses did not render the uncharged offenses excessively remote, in view of case law upholding the admission of evidence pursuant to section 1109, subdivision (e) involving similar periods of time. (See *Johnson, supra*, at pp. 537–540 [approximately 18 and 14 years]; *Culbert, supra*, 218 Cal.App.4th at pp. 192–193 [11 years]; *Megown, supra*, 28 Cal.App.5th at p. 168 [16 years].) This is particularly true given that the People's motion in limine indicated that Mitchell had suffered additional convictions in 2010 for crimes committed against elderly victims. The trial court could therefore have reasonably found that Mitchell had not lived a "blameless life in the interim" between the commission of the Santa Clara offenses in 2001 and the commission of the charged offenses in 2016. (See *Johnson*, at p. 534 [stating that "[r]emote prior conduct is, at least theoretically, less probative of propensity than more recent misconduct," and that "[t]his is especially true if the defendant has led a substantially blameless life in the interim"].)

Mitchell's arguments to the contrary are not persuasive. Mitchell contends that it was not in the interest of justice under Evidence Code section 1109, subdivision (e) to admit evidence of his commission of crimes in the Santa Clara case because the offenses in that case were far more serious than the charged offenses, in that the Santa Clara offenses involved "multiple suspects," and the crime of residential robbery. As discussed above, the trial court could have reasonably determined that the uncharged crimes and the charged crimes were largely similar. The charged crimes were committed against elderly



victims in their residences, while the victims were present. In addition, with respect to the charged offenses against victim L.R., Mitchell was not alone at the time he committed the crimes. Rather, a woman was waiting in the car while Mitchell committed the crimes. Mitchell also claims that Detective Geibig's testimony portrayed Mitchell "as part of a gang of thieves who committed crimes against elderly people throughout the Bay Area in 2001." While Geibig's testimony did portray Mitchell as working with a group of individuals to commit crimes against elderly people,<sup>12</sup> that is because Mitchell committed acts that supported such a portrayal. (Cf. *People v. Karis* (1988) 46 Cal.3d 612, 638 ["The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence"]; *Johnson, supra*, 185 Cal.App.4th at p. 539 [Evidence Code section 1109, subdivision (e) does not necessitate "an inquiry different in kind from that involved in a determination under [Evidence Code] section 352"].) Finally, Mitchell claims that Geibig's testimony "implied that appellant had actually committed many more crimes against elderly people than was established by his judicially noticed 2002 convictions." Mitchell did not object to the testimony on this ground in the trial court. As a result, this contention is forfeited. (Evid. Code, § 353; *Pearson, supra*, 56 Cal.4th at p. 438.)<sup>13</sup>

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<sup>12</sup> Geibig did not refer to the group as a "gang," nor suggest that the crimes were gang-related.

<sup>13</sup> While we do not draw the same inference from Detective Geibig's testimony, if Mitchell had raised an objection on this ground in the trial court, the court could have addressed the issue.

Accordingly, we conclude that the trial court did not abuse its discretion in admitting evidence of Mitchell's commission of elder abuse crimes that occurred more than 10 years before the charged offenses.

D. *We need not consider Mitchell's claim that the trial court erred in admitting evidence of his prior convictions under Evidence Code section 1101, subdivision (b)*

Mitchell claims that the trial court abused its discretion in admitting evidence of his prior convictions under Evidence Code section 1101, subdivision (b). In light of our conclusion that the trial court properly admitted evidence of Mitchell's prior convictions under Evidence Code section 1109 (see pts. III.A–C, *ante*), we need not consider whether the evidence was independently admissible under Evidence Code section 1101. (See *People v. Jennings* (2000) 81 Cal.App.4th 1301, 1316 ["Because we conclude the . . . evidence was generally admissible under section 1109, we need not consider appellant's alternative argument that it should have been excluded when offered for a specific purpose under section 1101"]; see Evid. Code, § 1109, subd. (a)(2) ["in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is *not* made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352" (italics added)].)<sup>14</sup>

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<sup>14</sup> We also need not consider Mitchell's arguments as to prejudice, since he has failed to establish any error.

E. *Mitchell is entitled to have the trial court exercise its discretion as to whether to impose or strike two five-year prior serious felony enhancements under a new provision of law*

Mitchell contends that his sentence should be vacated and the matter remanded for resentencing so that the trial court may consider whether to exercise its discretion to strike his two prior serious felony enhancements under section 667, subdivision (a)(1), as amended by Senate Bill No. 1393 (S.B. 1393), chapter 1013. The People concede that the amended law applies retroactively to Mitchell's case, but contend that no remand is required because the record indicates that the trial court would not have sentenced Mitchell differently under the new law.

1. *The change in the law*

On September 30, 2018, the Governor signed S.B. 1393 which became effective on January 1, 2019. S.B. 1393 amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Under previous versions of these statutes, a trial court was *required* to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)(1)), and the court had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667." (Former § 1385, subd. (b).)

2. *The change in the law applies retroactively*

Mitchell contends that S.B. 1393 applies retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing, based on a prior serious

felony conviction, provided that the judgment of conviction was not final at the time S.B. 1393 became effective on January 1, 2019. The People concede that the law applies retroactively to Mitchell's case.

In *People v. Garcia* (2018) 28 Cal.App.5th 961 (*Garcia*), another division of this district held that "it is appropriate to infer, as a matter of statutory construction, that the Legislature intended [S.B.] 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when [S.B.] 1393 becomes effective on January 1, 2019." (*Id.* at p. 973.) We agree with the *Garcia* court's analysis, as well as with its conclusion, and we therefore accept the People's concession that the amendments of S.B. 1393 apply retroactively to Mitchell's case.

### 3. *Remand is required*

Mitchell argues that a remand for a new sentencing hearing is required in this case to permit the court to determine whether to exercise its discretion to strike one or both of the serious felony enhancements.

" '[W]hen the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise that sentencing discretion at a new sentencing hearing." (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Remand is not required, however, if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*Ibid.*)

The People contend that remand is not required because the record demonstrates that the trial court would not have stricken the five-year enhancement, even if it had possessed discretion to do so. In support of this contention, the People note that, at sentencing, the court declined to strike Mitchell's two prior strikes, made comments concerning Mitchell's lengthy criminal history and the seriousness of the crimes, imposed the upper term on the failure to appear on bail count (§ 1320.5), and declined to strike an elderly victim enhancement (§ 667.9, subd. (a)).

We agree with the People that the trial court concluded that "it would not be in the furtherance of justice to reduce [Mitchell's] punishment," with respect to several sentencing decisions. However, unless the record contains a clear indication that the trial court would not have stricken the *prior serious felony conviction enhancements*, remand is required. On that issue, the record is silent. In imposing the enhancements, the trial court stated only the following:

"As to the allegations, additionally, the defendant having suffered two prior serious felony convictions, i.e., nickel priors in cases CC128873 and VA108993 within the meaning of Penal Code sections 667, subdivision (a)(1), 668, and 1192.7, subdivision (c), two additional determinant terms of five years apiece shall be served for each such prior conviction consecutive to each other and consecutive to the life terms."

In sum, after carefully reviewing the record, we see no clear indication that the trial court would not have stricken the serious felony enhancements if authorized to do so. We therefore conclude that remand is appropriate in this instance, to allow the trial court to resentence Mitchell and to exercise its discretion with respect to whether to strike either or both of the five-year prior serious felony enhancements.<sup>15</sup>

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<sup>15</sup> We emphasize that we do not intend to suggest that the trial court should exercise its discretion to strike the enhancements at issue here; we make no comment on the propriety of such a decision. We remand solely to allow the trial court the opportunity to exercise its discretion.

IV.

DISPOSITION

The judgment of conviction is affirmed. Mitchell's sentence is vacated. The matter is remanded for resentencing. Upon resentencing, the trial court shall consider whether to exercise its discretion to strike either or both of the serious felony enhancements (§ 667, subd. (a)(1)), in light of the law as amended effective January 1, 2019.

AARON, J.

WE CONCUR:

O'ROURKE, Acting P. J.

GUERRERO, J.